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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 806

J. H. PAGE, ET AL.,

Appellants,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL,

Appellees.

BRIEF FOR APPELLANTS

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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To the Honorable Supreme Court of the United States:

On or about the 1st day of February, 1958, J. H. Page, and the other heirs of Samuel Harrison Page, deceased, record title owners of an undivided one-half interest in a tract of 83 acres of land in the Imla Keep League of 1 and in Brazoria County, Texas, filed suit No. 38693 in the District Court of Brazoria County, Texas, to recover title and possession of their one-half interest in the said 83 acres; process was promptly issued and served on all of the defendants; and the defendants, after first filing answers appropriate in suits in trespass to try title, viz, general denial, pleas of not guilty, and then followed with a motion for summary judgment. Appellants demanded a jury, and paid the requisite jury fee shortly after filing the suit, and long before the motion for summary judgment was filed by the appellees.

The Trial Court granted summary judgment to appellees under the Texas Civil Procedure Rule 166A February 7, 1967; motion for rehearing denied July 21, 1967. Appellants perfected appeal to the Court of Civil Appeals, First Supreme District of Texas, at Houston, and said Summary Judgment affirmed. Reported in Vol. 412, page 797, Southwestern Reporter, 2nd series.

The Supreme Court of Texas refused writ of error, without opinion. A copy of the action of the Supreme Court is on file in the record heretofore filed in this Honorable Court. Motions for re-hearing were overruled by the Supreme Court of Texas, as disclosed by the Record now on file in Clerk's office of the United States Supreme Court.

When the State Trial Court, in its construction of Rule 165-A, of the Texas Rules of Civil Procedure which provides for a Summary Judgment, without disposing of the fact issues raised, are litigants deprived of their property without due process of law, and said summary judgment rendered in this case is contrary to and in violation of the Seventh Amendment of the Constitution of the United States, which provides that "In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by Jury shall be preserved; and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of Common Law."

The summary judgment rendered in this case violates "Article VI (second clause) of the Constitution, and of the laws of the United States which shall be made in pursuance thereof * * * and the laws of the United States made or which shall be made under the authority of the United States, shall be the Supreme Law of the land; and the Judges in every state shall be bound thereby, anything in

the constitution or laws of any state to the contrary notwithstanding."

Section 15, of the Bill of Rights of the Constitution of 1876, of the State of Texas provides: "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."

In the appellants' motion for rehearing, and supplemental brief filed in the Supreme Court of Texas, appellants called attention to the affidavit of plaintiff, Mae Page Riley, stating that her grandfather and grandmother were Samuel Harrison Page and Elener Page; that her grandfather died in the year 1893, in Nueces County, Texas; and that she (Mrs. Riley), lived near her grandmother all her life — she died in the year 1912 (see affidavit Mrs. Riley, page 103 transcript), and that she had numerous conversations about her grandfather, Samuel Harrison Page, and that "my grandmother told me that Samuel Harrison Page never sold the land which he inherited from his mother, Eliza Page Chase, during his lifetime, and said land would belong to the heirs of Samuel Harrison Page after his death. Said affidavit is on page 103 of the Clerk's Transcript.

In the case of *Whitehead* v. *Shattuck*, 11 S. Ct. 276, 138 U.S., 34 L. ed. The Court, in referring to the Seventh Amendment declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." "That provision would be defeated if an action at law could be tried by a court of equity, as in the latter court a jury can only be

summoned at its discretion, to ascertain special facts for its enlightment." Citing:

Lewis v. *Cooke,* 90 U.S. 23; Wall. 466, 470 (23: 70, 71);

Killian v. *Ebbinghaus,* 110 U.S. 568, 573; (28): 246, 248);

Buzard v. *Houston,* 119 U.S. 347, 351 (30: 451, 452).

"And so it has been held by this court 'that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, *the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.*" Citing: *Hipp* v. *Babin,* 60 U.S.; 19 How. 271, 278 (15: 633, 635).

"It would be difficult and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that where an *action is simply for the recovery and possession of specific real property,* including damages for withholding it, has always been of that class. The right which is in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

The Supreme Court of the United States has always held, in its decisions, that where a litigant has demanded a jury trial, and paid the fee, and plead the Seventh Amendment of the Constitution of the United States in the State Court will take jurisdiction of the case.

CONCLUSION

Appellants respectfully pray that this petition for a writ of certiorari be granted for the foregoing reasons.

Respectfully submitted,

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